We note, of course, that the Commission has not expressed its desires in these terms. Instead, it has proposed to eliminate the various Radio Services supported by the nineteen coordinating entities activities, and consolidate all into three frequency pools (plus SMR). The Commission's proposals would allow coordinating entities to dip into the pools for their eligibles' needs, but the nature of eligibility is so generalized that there will be little left to distinguish between a steel company and a farmer.[13]

Since the Commission certified coordinating entities based on their status as representatives of an industry group, it appears that the reduction to three generalized pools would eliminate this criterion entirely. The Commission's Rules would no longer distinguish between users and licensees based on the type of business performed. The proposed rules are, for all intents and purposes, neutral on this point. Accordingly, the historic reasons for representative capacity by frequency coordinating entities has been effectively eliminated

each general class. Even in this task, there is little for coordinators to do which might somehow be improved by representative capacity. Absent any continuing reason to divide the public into specialized groups, the Commission should designate all users into one group, the American public, and provide them free access to the spectrum without the need to seek often unwanted "assistance" from coordinating entities.

In effect, the Commission produces the great spectrum pie and serves up to each coordinator a presumably equal-sized fork with which to serve its members. No lines are drawn on the top crust, so that the neediest or the greediest will reap the lion's share. The dinner bell rings on the date of adoption and the cutlery begins to fly. In the melee which will follow, hungry members will circle the pie and demand service from the coordinator

costs, and then allow the entities to mark up those pass on such costs to the public.[14]

The Commission's common defense of the existing frequency coordination system has been to applaud the representativeness of the coordinating entities and speak of their laudable contributions on behalf of their respective memberships.[16] The Commission has argued that only representative organizations are properly positioned to determine the advisability of adding another user within a geographic area and within a particular frequency group. Given the Commission's past defense and its present elimination within its proposal, the obvious question becomes, what will become the justification for continuing frequency coordination as a quasi-governmental function?[17]

The Commission has long stated that its efforts to meet the needs of the public have been greatly enhanced over time by the cooperation of frequency coordinating entities which express creative approaches in spectrum management designed to support their members and strengthen that section of the economy. It appears, by its proposals, that the Commission no longer feels the need of such assistance; at least, in the form of numerous frequency coordinating bodies, each shepherding its members onto discreet channels. We agree, but with the most serious reservation.

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[16] The Commission's past decisions have never dealt with the fact that its system is one of forced representation.

[17] One can easily argue that the continued existence of all presently certified coordinating entities will be highly inefficient following adoption of the Commission's proposals. The extreme need for inter-coordinator coordination will be so intense that this task might stymie all of the participating entities.

The Commission's proposals obviously reduce the primary function of frequency coordination to a merely ministerial task. The Commission may argue to the contrary, but such arguments would be futile. Without a representative capacity which is tangible, everything to be performed by remaining members of the coordinating triad would be only data base management. Nothing else proposed by the Commission (such as post-licensing conflict resolution) is backed with authority of any kind. Therefore, those other "duties" are illusory at best and mostly voluntary. Since it is apparent that the functions of the coordinators would be nothing more than record keeping and data base management, the remaining coordinating entities[18] should be accorded precisely that status.

Once the emperors of the kingdoms of coordination are observed in their denuded reality, without the imaginary trappings and finery of faux representative capacity, the question emerges again as to who is the true benefactor of their rule. Again, we aver that the Commission itself is the sole benefactor of the coordinating entities' activities. Although this fact has been repeated consistently by our firm since before PR Docket 88-548 and is supported by the plain language of the Communications Act which states that the Commission may employ the services of frequency coordinating entities, we still have not received a cogent response to our question; *For whom do the coordinators work?* Instead, the coordinating committees and the Commission have joined in an alliance to claim that the

[18] We believe that the Commission's quasi-free market system would cause many coordinating entities to abandon the task of frequency coordination.

coordinators' status is one of "conduit", a status that does not exist in all of law. The paucity of legal support for this concept of coordinators' status is so blatant as to be absurd.

That the coordinators will continue to be employed only to serve the Commission is made even more apparent by the Commission's NPRM. The Commission urges coordination to be performed employing "vertical stacking" placing co-channel users as close together as might be deemed practical by the coordinator. The NPRM further states at proposed Section 88.83(d)(1) that applications will be accepted only for frequencies recommended by coordinators. These two conditions are more than vexing, they are inappropriate given the Commission's historical position regarding the duty of coordinating entities. Taken together, these proposals place the applicant's decision making, regarding its system design, solely within the hands of coordinating entities. It appears that any disagreement with the actions of a coordinating entity will place an insurmountable burden on the applicant to demonstrate that the coordinating entity has erred. The result would be that the administration of the radio spectrum would no longer be within the purview of the Commission, but would instead become almost entirely privatized.

If adopted, the Commission's proposals will exacerbate the conflicts which presently exist between coordinator and applicant. Already, applicants who disagree with the recommendations of coordinating entities are required to pay the coordinator to fight with them before the Commission. The Commission's proposal regarding vertical stacking will place coordinators and applicants in direct conflict as horizontal stacking is in the applicants'

best interest, while vertical stacking is in the Commission and coordinators' interests. Given the choice of which master to serve, we suggest that the coordinators will comply with the Commission's mandate to the detriment of applicants.

There are serious questions as to whether such a system is in accord with the Communications Act, even with the language allowing the Commission to employ the services of the coordinating entities. It goes too far toward allowing coordinating entities to usurp the primary duties of the Commission. Such serious and paramount questions aside, it once again begs a question repeated by this firm so many times that the echo reverberates to the core of the entire frequency coordination system.

We believe that the sweeping changes and complete overhaul of the Private Radio Services proposed by the Commission's NPRM make ripe the time for addressing the fundamental issue of the coordinators' *legal* status. Stated more specifically, it's time to identify with finality and with full support of law, for whom the coordinating entities work when they perform frequency coordination functions. It is our conclusion, based on law, fact and the manner in which frequency coordination is performed and is to be performed, that the sole benefactor is the Commission. Based on this irrefutable fact, we repeat again our claim that the servant should be paid by the master -- the Commission should foot the bill for coordination.

In the alternative, the Commission might opt to eliminate frequency coordination as an outside function. Assuming the Commission can cajole Congress into financing the enormous workload to be created by adoption of the remainder of its proposals, we assume that it might be equally persuasive in getting funds released to perform the ministerial function to be accomplished by the coordinating entities. Many benefits would flow from taking the task in-house. Primarily, however, would be the restoration of the Commission's integrity and authority in its licensing function.

With the adoption of conditional licensing authority pursuant to frequency coordination, the Commission dealt itself a blow by allowing outside agencies to usurp its licensing authority. Present policies have the Commission's processing of applications performed concurrently with "temporary" or "conditional" authority to construct and operate facilities. Although the present policy has caused problems when it is employed for anti-competitive purposes, the ability to operate under conditional authority following adoption of the Commission's proposals would become a major factor in the management of the spectrum.[19]

Without a guarantee of necessary resources, the avalanche of applications to be processed following adoption of the Commission's proposals would create enormous delays

[19] Even where it knew that an operator proceeding under temporary or conditional authority was causing harmful interference, the Commission has been reluctant to terminate the operation. If it is swamped with applications, the Commission is even less likely to run the risk of creating new litigation burdens for itself by strictly enforcing the rules which are intended to keep licensees from one anothers' throats.

in the Commission's speed of processing. This would naturally extend the period during which applicants might operate under conditional authority, without benefit of the Commission's scrutiny of applications during the processing phase, while applications await

[redacted]

permissible or advisable. Perhaps the best and most logical place to begin the entire examination is to ask first, are these entities necessary or useful to the public following adoption of the Commission's proposals? And, if so, under what authority and legal status? And, if not, what steps are necessary to assure that the Commission has the resources to recapture the full strength of its diluted authority?

More Better Blues

The Commission's proposals, in the abstract, would approach the laudable goal of providing additional opportunities for existing and future Private Radio licensees. The addition of channels is always welcomed by persons who are straining under present limitations which exist due to high demand for a limited resource. Ergo, relief is welcome, necessary and beneficial to the majority of interested persons.

What is troubling, however, is the fact that the Commission has not demonstrated that it presently possesses or will possess in the foreseeable future the resources to manage the vast number of new systems and operators to be created by its proposed actions. For example, the Commission's record in handling co-channel interference complaints among existing licensees is far from stellar. A review of the Commission's enforcement efforts will amply demonstrate that the Commission does not have the resources (and consequently, the commitment) to handle these common complaints. The result has been that operators have suffered long and harshly, due to the Commission's inability to deal with these harmful situations.

The Commission now proposes to increase the number of Private Radio systems by geometric proportions. The NPRM does not, however, state how these increases will be supported by increased enforcement efforts and resources. Does the Commission believe that by increasing the number of channels there will be such an abundance of channels that co-channel interference complaints will become a thing of the past?[20] We disagree and believe that any increase in channels will result in greater numbers of enforcement problems for the Commission. It is, therefore, vital that the Commission demonstrate to the public its ability to enforce its rules over the entirety of new regulatees that its proposals will create.

As discussed, *supra,* relative to anticipated increases in applications and potential processing delays, the Commission must demonstrate that after the applications have been processed, it will possess sufficient resources to guarantee that the resulting numbers of licensees operate in strict accord with the Commission's Rules. This imperative will be even more pronounced under the Commission's proposals since the possibility of adjacent channel interference will increase dramatically due to the narrowing of permissible bandwidths.

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[20] The NPRM suggests that the Commission is forwarding a highly myopic view of the results from its creation of additional channels. Experience shows that the pent up demand for additional spectrum will overwhelm any increase in channels and that, in a very short while, the number of co-channel interference complaints will reflect the geometric increase in the number of licensees and systems to be created by the Commission's proposal. The openings of the "new" 800 Mhz band in 1982, the 900 Mhz band in 1986, and the 220 Mhz band in 1991 each saw amazing increases in the number of applications filed. The demand for 220 MHz band channels exceeded our estimates by a factor of ten. A little thought reveals that a new increase in the number of licensees results in a geometric potential for interference problems. At best, the adoption of the Commission's proposals might produce a brief respite, followed by even greater demand for enforcement efforts.

We are encouraged by the efforts recently shown by the Field Operations Bureau's enthusiasm to understand and develop investigatory methods and enforcement guidelines relevant to co-channel interference. Recent actions might mark a turning point in this area which will reward the complying operator and rid the marketplace of the "time bandits" which improperly occupy shared frequencies in a manner which does not serve the public, only to gain an anti-competitive advantage.

We are, however, acutely aware of the limitations of the FOB's resources and ability to respond to legitimate complaints which often languish for months before a proper response is possible. The delay in enforcement presently evidenced by the Commission has caused the destruction of more than one legitimate business. What promises, then, supported by tangible, available resources does the Commission make herein which might guarantee that operators will not suffer even greater neglect following the adoption of these proposals? Some evidence is required to show that the Commission is not attempting to solve one problem while greatly exacerbating another.

In accord with its Congressional mandate, the Commission has but two duties -- to create rules and to enforce rules. By its aggressive proposals the Commission has, once again, demonstrated that it is able and willing to make rules. It has yet to demonstrate that it can enforce all of the rules which it makes. Until the Commission is able to perform the latter with the same success as the former, we cannot support any rule making which might further jeopardize existing, legitimate licensees.

A zeal for enforcement does not come through in the Commission's proposal. In fact, the NPRM contains additional suggestions of the Commission's chill upon the complaint process. As stated at Appendix A of the NPRM at page 16 regarding Innovative Shared Use Radio Operations, the Commission's proposed process for handling co-channel interference complaints would create so many barriers to relief as to make complaints virtually useless.[21]

[redacted]

At the same point in its NPRM, the Commission states that it expects all operators to cooperate in the shared use of the spectrum. What the Commission does not state is how a victimized operator might cooperate. The Commission has long failed to address this primary issue in disputes. So often the victimized operator is told that it must cooperate in sharing the spectrum, but no guidelines are provided. The obvious implication is, of course, that the victimized operator can only be found to have cooperated if the victim endures the problem or bears the cost of modification of its system to avoid further instances. This apparently unfair element of complaint resolution must be brought to an immediate halt as it penalizes the compliant operator and rewards the interfering party.

The Commission has placed an unfair burden on the second licensee. The Commission's proposal states that the Commission will look to the second licensee to resolve problems which arise. This is absurd. The Commission should look exclusively to the party which is either violating the Commission's Rules or policies, or the licensee which has constructed a system which makes equitable sharing a virtual impossibility. Equity is not served by placing the burden on the second operator, irrespective of the quality of the first licensee's system. We thought that the Commission had learned from the WVUE-TV case that the "last man in" concept does not work. The concept would be useless in an environment in which hundreds of thousands of bandwidth reduction applications and system motifs created a continuously shifting "last man" on each channel in each geographical area.

The Commission's final suggestion is that it may order that both operators cease all operations until the problem can be resolved. As if the remainder of the Commission's suggestions do not create an unwanted chill on the complaint process, this suggestion is ridiculous in the extreme. Our firm has prepared numerous complaints on behalf of beleaguered operators who, at the time that the co-channel problems arose, were serving a substantial client base. If the Commission had decided to shut down the businesses of the serious operator and the victimizing interloper, the Commission's actions would have resulted in bankruptcy of the legitimate operator. Even the threat of such action would prevent many parties from forwarding legitimate complaints.

We urge the Commission to end its convoluted complaint process which is obviously designed to keep the agency out of the complaint resolution business. We urge even more strongly that the Commission not add to its already chilling efforts by additional threats against complaining parties. The creation of new boundaries inevitably creates new boundary disputes and an agency creating new boundaries has a duty to process and justly resolve complaints. This is a primary portion of its duty to enforce its rules. Enforcement should not be granted readily for Broadcast licensees and withheld from Private Radio licensees. Unless the Commission is ready to fly in effective peacekeeping forces, it should not create the bases for more civil (or uncivil) disputes.

We reiterate that the Commission's Congressional mandate requires that it create and enforce its rules. If in its deliberations regarding the results of its adoption of the proposals

contained within the NPRM, the Commission has found that it will create an environment in which it will be unable or unwilling to meet its mandate, it is necessary that the Commission admit its failing and decline to adopt rules which it is powerless to enforce. To do otherwise would be to codify excuses for its anticipated failure, rather than excelling in service to the public interest.

Technology Forcing Is Not Lawful

At proposed Rule Section 88.1015(b), the Commission proposed to impose a requirement on licensees of Innovative Shared Use (ISU) systems which it simply lacks the

today's state of the art system ten years late. While such a solution is hardly the one which the Commission intended, the Commission clearly lacks the authority to engage in technology forcing or to penalize a licensee for reaching a technical goal for which there could be no certainty of reaching when the condition was imposed.

If the Commission desires to encourage innovation, then the solution to the Commission's lacking the authority to require an unproven improvement in technology is to hold out a reward which the licensee may obtain if successful. For example, the Commission might hold some ISU channels in reserve and adopt rules making them available as additional channels on a exclusive basis to ISU licensees who meet the technology improvement goals. Better, it might initially authorize multiple applicants to share the channels, then award the channels exclusively after ten years to the sharing licensee who had developed the most efficient use of them and refuse to renew the other operators' licenses. The potential for exclusive use of hundreds of channels nationwide might make the game worthwhile to those who have the wherewithal to have a chance of serving the public interest by competing in the field of spectrum efficiency. While some speak of spectrum auctioning in terms of dollars paid to the public treasury, an auction of spectrum based directly on proven improvement in spectrum efficiency might provide far greater benefits to the public interest than any amount of cash paid at auction.

Termination Of Multiple Licensing

At proposed Rule 88.321, the Commission would make a dramatic change, bringing an end to multiple licensing of base stations (community repeater operation) and apparently requiring conversion of existing community repeaters to SMR operation. We note that, although the Commission stated at footnote 29 to its NPRM that it would allow existing community repeater systems to operate in that mode of licensing indefinitely, proposed Rule Section 88.321 contains no language which would effectuate that promise. Therefore, if adopting proposed Rule Section 88.321, it needs to add appropriate grandfathering language to codify the intent of footnote 29.

If the Commission desires to make the most of its intent in proposing Rule 88.321, it should provide a mechanism by which the operator of a community repeater can obtain an SMR license without having to buy off his customers to obtain their assent. Perhaps the Commission could add to Rule 88.321 a provision stating that "The operator of an existing community repeater shall have a dispositive preference for its application for an SMR license for its base station and all associated mobile units and control stations. Upon grant of an SMR license to the operator of an existing community repeater, the effective radiated power of all licenses held by end users of the community repeater shall be reduced to zero, pursuant to section 88.171 of this chapter." The adoption of such a provision would provide an incentive for the community repeater operator to reduce the Commission's licensing burden and facilitate the community repeater operator's conversion to SMR operation without having to be held hostage to the whims of his customers.

Rule Section 88.7: Definitions

By our comments below, we urge the Commission to review carefully its proposed definitions. Since the Commission's and applicants' and licensees' future actions will be strongly guided by the specific wording of these definitions, including the proper interpretation and application of each subsequent rule section, special care must be given to each word. Further refection on definitions may prevent misunderstanding and error. Accordingly, the following suggestions and comments are offered:

To the end of the proposed definition of "digital voice modulation" should be added the phrase "or simulation thereof". The definition as proposed by the Commission would not facilitate progress in the transmission of a digital signal that was a coded representation of information which would be interpreted by the listener as if had originated with a human voice, but which, in fact, had not been produced by a human voice. Adding the suggested phrase would facilitate the efficient transmission of a digital representation of a wholly synthesized signal which, although the demodulated signal could be understood in the same manner as can a human voice, had not been created by using a human voice as the source.

The proposed definition of "dispatch communication" should be revised to state an absolute maximum duration of such a communication. As proposed, the normative definition does not serve as the basis either for decision making or for enforcement and, therefore, is useless in the administrative context.

The proposed definition of "harmful interference" should be revised to remove the word "seriously". The current definition of this term provides an enforceable standard, against which blame can be assessed and a forfeiture assessed. The proposed addition of the word "seriously" is entirely inappropriate in the administrative context because it provides a malicious interferer the opportunity to argue endlessly that the interference which he caused to his victim was not "serious". The place where the Commission needs to use the word "serious" with respect to instances of harmful interference is in making serious efforts to interdict perpetrators of harmful interference and to exercise its enforcement powers in a serious manner to discourage destructive abuses of the radio spectrum.

The Commission has stated in many instances that it possesses sufficient discretion to enforce or not enforce its rules as they might pertain to any specific instance. We strongly

The proposed definition of "interference" could be clarified by making it read ". . . performance degradation; or misinterpretation . . . ,".

The proposed definition of "internal system" is slightly different from the definition of the term at Section 90.7, but it is equally meaningless. While the Commission may have intended the definition to say something about an internal transmitter control system, such as is covered under Part 90, Subpart O, the proposed definition seems to define most every land mobile system as an internal system and does not seem to distinguish one type of system from any other. Since the proposed definition does not refer to transmitter control, we can't be certain whether that was the direction in which the proposal was headed, and so, we can't suggest a way of making this definition useful.

The proposed definition of "itinerant operation" requires fewer calories to read than its predecessor, but it is no more filling. The proposed definition would appear to include a mobile unit within its definition. Perhaps the definition should read "Operation of a base station at unspecified locations for a period of less than one year," which we believe is what the Commission intends by the term.

The proposed definition of "occupied bandwidth" provides no standard at all. Although its first sentence appears to provide a standard, the second sentence takes it away by stating that "in some cases . . . a different percentage may prove useful." The only useful definition of occupied bandwidth in an administrative context would be one which set

a definite standard or standards for all cases. The proposed definition would give no guidance to system designers, but would give great tolerance for those who would abuse the spectrum to argue that any bandwidth which they had chosen to occupy constituted "such a case" for the use of a different percentage. If the Commission is not prepared to establish a variety of standards for specific cases, it would do better to establish a single standard and to recognize a different standard only on a case-by-case waiver basis.

The definition of "offset frequencies" proposed at Rule 88.7 is not meaningful. All allocated frequencies are "separated from regularly assigned frequencies by a given amount and may be assignable in certain land mobile radio services under certain conditions". We would suggest an alternative, but we can't ascertain what the Commission intended to accomplish by the proposed definition.

By the proposed definition of "point-to-point" does the Commission mean that the act of a person's "describing communication between two fixed stations" constitutes point-to-point? What if he just points, rather than describing the communication in detail? Perhaps the word "describing" should be omitted from the proposed definition.

The end of the proposed definition of "primary operation" needs to be revised to read " . . . facilities operating on a co-primary or a secondary basis." As proposed, the definition would not provide for protection of co-primary stations against harmful interference from one another.

To the end of the proposed definition of "squelch" should be added the phrase "or certain information content". The suggested revision would cover those squelch systems which are not based on signal level, but are based, instead, on such characteristics as tone frequency or data content.

The proposed definition of "station authorization" includes either too much or too little. Expanding upon the current definition which is limited to a "license", the proposed definition would add "special temporary authorization", but would exclude such forms of authorization as (routine) temporary authorization and conditional authorization. We suggest that the Commission either revert to the current definition, or include all of the various forms of "station authorization" within the definition.

The Commission's effort to define "station" is a valiant one. However, in view of the numerous ways in which the term is used and its varied meanings, the Commission might do best to continue not to include any definition of it in the Rules.

The proposed definition of "tone signalling" would appear to be both too narrow and too broad. It is too narrow in being limited to "voice frequency tones" (thereby excluding "sub-audible" tones below the range of most voices) and is too narrow in including "impulse signals" which should not be defined as "tones".

The definition of "waiting list" is not quite correct. It should be revised to read "A list of applications filed for radio licenses at locations at which all allocated frequencies were assigned at the time of the filing of the application. Each application is ranked within its category of preference in order of receipt." The final phrase of the proposed definition is not universally correct and should be omitted, since all applicants on a waiting list have sometimes rejected channels which became available.

To avoid misleading the public, the Commission should refrain from using the word "exclusive" unless the Commission's Rules truly exclude all but one licensee from a channel within a defined geographic area. If the Commission has in mind providing for something less than true exclusivity, it should use the term "limited shared use".

The Commission could add clarity to its proposed rules. We, therefore, recommend that the Commission carefully scrutinize its proposed definitions to assure a framework for its proposed Part 88 the realities of the marketplace will reliably support the reminder of its efforts.

Improvements In Exclusive Use Overlay

There does not appear to be any reason to limit the applicability of the EUO rules to the bands below 470 MHz. Providing the opportunity for a licensee in the bands above 470 MHz would appear to provide the same benefits to the public interest. Indeed, the benefits may be even greater above 470 MHz.

Providing a freeze for an EUO system application and a prohibition on grant of new licenses in the bands above 470 MHz would preclude the opportunity for much of the mischief which is seen in these bands. As the Commission must be aware, some persons, upon recognizing that another operator was approaching exclusive use of a channel have filed a "spoiler" application for a small number of mobile units, thereby making an anti-competitive attack on the growing system by preventing the operator from obtaining exclusive use of the system without ransoming the channel. Because the Commission's Rules routinely provide for exclusive use of channels for centralized trunked operation, allowing a qualified operator a better opportunity to attain exclusive use of a channel should pay dividends to the public interest.

The mischief of strike applications, intended solely or primarily to obstruct a licensee from ever actually achieving exclusive use of a channel, would be fostered, rather than prevented, by proposed Rule Section 88.183. If the Commission is to derive any substantial benefit from the EUO plan, it needs to appreciate the ends to which some commercial service operators currently go to obstruct one another in the bands above 470 MHz. Where the Commission's Rules permit, as would proposed Rule 88.183, "an existing licensee" to increase the number of mobile units placed in service, some operators have been known to obtain an existing license by assignment of authorization, then increase the number of mobile units authorized with the alternative objectives of extracting a payoff from a co-channel operator for surrendering the disingenuous license or preventing the co-channel operator from